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No. [redacted]

In the

Supreme Court of the United States

October Term, 1939.

L. SINGER & SONS, a Corporation, *et al.*, *Petitioners*,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 825.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 109 Fed. (2d) 493. The opinion of the District Court for the Western District of Missouri is reported in 26 Fed. Supp. 721.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners' Complaint.

Petitioners allege that they were engaged in the business of buying and selling fruits and vegetables at wholesale in the City Market located in Kansas City, Missouri, which was an old and well established market, having suitable and adequate transportation facilities of all kinds; that respondent was a common carrier by railroad, having its eastern terminus in the City of Kansas City, Kansas, where that city and respondent were engaged in building a food terminal or produce market on a tract owned by the latter city; that respondent was building tracks to the Kansas City, Kansas, Market, but it had not obtained from the Interstate Commerce Commission a certificate of public convenience and necessity (R. 4) authorizing such construction, as required by paragraph (18), Section 1, Transportation Act, 1920 (Title 49, U. S. C. A., Sec. 1, par. [18]). None of the petitioners are carriers whose territory is or will be invaded by reason of the proposed construction. Petitioners invoke paragraph (20) of Section 1, Transportation Act, 1920 (Title 49, U. S. C. A., Sec. 1, par. [20]), which in substance provides that "any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the state or states affected, or any party in interest. * * *" Petitioners contend that they are parties in interest within the meaning of paragraph (20) and are hence entitled to maintain the suit because the construction of the trackage in Kansas City, Kansas, by respondent will:

(a) Destroy or seriously affect the business in which petitioners are engaged at the Kansas City, Missouri, market, and their property devoted thereto;

(b) Create a rival market in Kansas City, Kansas, inconvenient to a great majority of citizens;

(c) Create a rival market without producing additional produce to be handled therein, in that the market in Kansas City, Missouri, is adequate to serve both Kansas City, Missouri, and Kansas City, Kansas;

(d) Result in unnecessary duplication of railroad facilities at a cost of more than $500,000.00;

(e) Divert traffic to respondent from other railroads;

(f) Cause destructive competition between defendant and other railroads; and

(g) Result in wasteful and needless expenditure of money by respondent (R. 4).

Petitioners contend that because of these grounds they were entitled to relief against respondent under paragraph (20), Section 1, Transportation Act, 1920, enjoining it from constructing the tracks in question because of the failure of respondent to procure a certificate of convenience and necessity authorizing such construction as required by paragraph (18), Section 1, Transportation Act, 1920 (R. 5).

Respondent's Answer.

In its answer respondent, among other defenses, asserted that the complaint failed to state any facts upon which relief could be granted, in that petitioners were not parties in interest within the meaning of paragraph (20), Section 1, of Transportation Act, 1920, who were authorized to maintain the suit (R. 20-22). The District

Court upon a hearing in advance of trial, as prescribed by Rule 12 of the Federal Rules of Civil Procedure, held that petitioners were not parties in interest within the meaning and purview of paragraph (20) and entered its decree dismissing the complaint because it did not allege facts upon which any relief could be granted.

Intervention of the City of Kansas City, Mo.

The City of Kansas City, Mo., filed a motion to intervene, asserting its public and other alleged interest in the action (R. 5—). The ruling of the District Court denying the motion because the City was not a party in interest, 26 Fed. Supp. 721, was affirmed by the Court of Appeals, 109 Fed. (2d) 493. A petition for certiorari, No. 826, has been filed by the City from that ruling and response to that petition will be made in that case.

The Statutes Involved.

Petitioners averred in their complaint that respondent had failed to secure a certificate of public convenience and necessity for the construction of the trackage, as required by paragraph (18), Section 1, of the Transportation Act, 1920, which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation,

of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioners contend that because of the failure of respondent to secure a certificate of public convenience and necessity they were parties in interest who were authorized to maintain the action under paragraph (20) of Section 1, Transportation Act, 1920, which provides as follows:

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * * carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed * * *. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commissioner or regulating body of the State or States affected, or any party in interest; * * *."

Summary of Opinion of Circuit Court of Appeals.

The Court of Appeals held that petitioners were not parties in interest within the meaning of paragraph (20) who could maintain the action. It predicated its decision

upon the rulings of this Court in *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, and *Texas & Pac. R. Co.* v. *Gulf-Colorado & Santa Fe R. Co.*, 270 U. S. 266. It held that although petitioners' welfare may be affected because of competitive conditions which might ensue in the produce business and because of a material change being brought about in the transportation situation due to the construction of the alleged extension, yet petitioners had no right to complain because the complaint discloses that their welfare cannot be directly, but only indirectly and inconsequentially affected by the alleged extension (109 Fed. [2d] l. c. 496). The Court of Appeals pointed out that petitioners' welfare could not be directly affected by the proposed extension because they are not in competition with respondent and are not engaged in the transportation business. Their concern was the effect upon their business of changes which might be brought about because of the construction of the competitive food terminal enterprise. The Court of Appeals held that petitioners had not sustained any legal injury which would give them the right to complain (l. c. 496), and, accordingly, affirmed the decree of the District Court dismissing the complaint.

THE PETITION FOR CERTIORARI.

Summarily petitioners contend that certiorari should be granted by this Court for the reasons:

(1) The decision of the Court of Appeals is in conflict with the decisions of this Court in *Western Pacific* v. *Southern Pacific,* 284 U. S. 47; and *Texas & Pac.* v. *Gulf-Colorado & Santa Fe,* 270 U. S. 266; and

(2) That the interpretation of "party in interest" is an important question which this Court should determine and answer.

REASONS RELIED ON FOR DENIAL OF CERTIORARI.

Respondent contends that the petition for certiorari should be denied on the following grounds:

(1) The holding of this Court in *Western Pacific* v. *Southern Pacific, supra,* that a carrier whose welfare might be directly affected could maintain an action under paragraph (20), Section 1, Transportation Act of 1920, to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas & Pacific Railway Company* v. *Gulf-Colorado & Santa Fe Railway Company, supra,* to the same effect, were expressly followed by the Circuit Court of Appeals in its decision below and no conflict is presented; and

(2) The question as to who may maintain an action as a party in interest both generally and under the statute in question has been settled by a long line of decisions of this Court and needs no further exposition or interpretation by this Court in this case.

ARGUMENT.

I.

The holding of this Court in *Western Pacific v. Southern Pacific, supra,* that a carrier whose welfare might be directly affected could maintain an action under paragraph (20), Section 1, Transportation Act of 1920, to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas & Pacific Railway Company v. Gulf-Colorado & Santa Fe Railway Company, supra,* to the same effect, were expressly followed by the Circuit Court of Appeals in its decision below and no conflict is presented.

Petitioners unsuccessfully urged in both the District Court and the Circuit Court of Appeals that because their welfare might be adversely affected on account of the competition engendered by the construction of the Kansas City, Kansas, market and the tracks in question serving the same, they were parties in interest within the purview of paragraph (20), and hence were authorized to maintain the suit. They are not common carriers whose territory will be invaded by the proposed track construction. They point out no legal right created by the Act which has been threatened or violated by respondent. They say that all that is necessary to bring them in as a party interest is that their welfare may be adversely affected. Petitioners claim that the ruling of this Court in *Western Pacific* v. *Southern Pacific, supra,* supported this contention, but a consideration of the facts in that case and the ruling of this Court clearly demonstrates that the decision has no such scope or effect. In that case the Western Pacific

had applied to the Interstate Commerce Commission for a certificate of convenience and necessity authorizing it to construct a railroad into a territory contiguous to that then served by it. During the pendency of the proceedings before the Commission the Southern Pacific commenced the construction of a rail line into the same territory proposed to be served by the Western Pacific as specified in its application to the Commission. The Western Pacific brought proceedings to enjoin under paragraph (20) on the ground that its territory was to be invaded and the proposed construction by the Southern Pacific had not been authorized by the Commission. It was asserted by the Southern Pacific that the Western Pacific was a mere paper railroad and hence was not authorized to maintain the action. It was pointed out, however, that the application filed by the Western Pacific with the Commission was the first step it could take in order to secure authority to construct the track and the location of its line had already been fixed by surveys. In response to that contention, this Court ruled that the welfare of the Western Pacific was directly affected by the proposed construction.

The basis of the decision is apparent. It was that the territory of the Western Pacific was to be invaded by a competitor by unauthorized competition. This Court had previously ruled in *Texas & Pacific Railway Company* v. *Gulf-Colorado & Santa Fe Railway Company, supra,* that prior to the enactment of the Transportation Act, 1920, *no carrier* could claim exemption from honest competition. That Act conferred a right on an interested carrier to be exempt from unauthorized competition and consequently a carrier whose territory was to be invaded by another carrier through unauthorized competition was a party in interest whose right created by the Transportation Act,

1920, had been violated or *directly* threatened and could consequently enjoin such unauthorized competition.[1]

This Court in *Western Pacific* v. *Southern Pacific, supra,* evinced no purpose to depart from the decision in *Texas & Pac. Ry. Co.* v. *Gulf-Colorado & Santa Fe Railway Co., supra,* or other cases where the same rule has been applied. It is manifest that if anyone other than a carrier whose welfare might be adversely affected, as petitioners contend, could maintain an action under paragraph (20), then the plain language and historical purpose of the Transportation Act must be ignored.

In the enactment of the Transportation Act, 1920, the dominant objective of Congress was the maintenance and preservation of an adequate and efficient national transportation service in the public interest. At the time of the passage of this Act the railroads of the country had just been returned to private ownership from government operation during the World war. Congress realized that if a national transportation system was to be maintained, extensions of railroads or acquisition of railroads by

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[1]The Court of Appeals in its decision herein expressly followed the *Western Pacific case* and quoted profusely from the opinion, saying further at l. c. 495-6:

"It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business.

"* * * * * * * * *

"We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and inconsequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve."

carriers should be regulated, because improvident expenditures for such purposes might seriously impair the financial ability of the carriers to maintain essential transportation services.[2]

Hence, the Interstate Commerce Commission was the agency selected to control and regulate carriers in the extension of their railroads or the acquisition of new railroads. Public convenience and necessity was to control the judgment of the Commission in applications for authority. Penalties were prescribed for violations (par. 18, Sec. 1) and the civil remedy of a right to enjoin was conferred by paragraph (20) (see *Powell* v. *United States*, 300 U. S. 276). The United States, the Interstate Commerce Commission, any regulatory body of the state or states affected, and any party in interest might secure such injunctive relief. The public interest in the protection of the transportation system is the dominant idea of the enactment and the agencies delegated with the duty of enforcing civil remedies conferred by paragraph (20) are the United States, the Interstate Commerce Commission, and any regulatory body of the state or states affected.

Petitioners complain that traffic will be diverted from other railroads to respondent; that respondent is making an improvident expenditure for the construction of the tracks in question, and that a material change in the transportation system will occur. In the main these are all matters which affect public interest which may be asserted by those charged by Congress with the duty of protecting public interest and not by private individuals. The paragraph was not construed by this Court in *Western Pacific* v. *Southern Pacific, supra,* or in any other case, as giving to a private citizen the right to advocate the cause of the public.

[2] *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Ry. Co.*, 289 U. S. 76, and *California R. Com.* v. *Southern Pac. Co.*, 264 U. S. 331.

Conceivably the damage that will result to other railroads, as asserted by petitioners, is one that might be claimed by a competing railroad who would suffer such diversion because of the competition between the markets (see *Texas & Pac. Ry. Co.* v. *Gulf-Colorado & Santa Fe Ry. Co., supra*), but petitioners will no more be heard to advocate the cause of a competing railroad than they will be to espouse public right under the avowed purpose of law enforcement.

We submit that this Court in *Western Pacific* v. *Southern Pacific, supra,* did not either expressly or inferentially hold that anyone who might assert his welfare may be adversely affected could avail himself of the remedy to enjoin as prescribed by paragraph (20).[3] This is so not only because the language of the opinion considered in the light of the questions before the Court is not susceptible of such construction, but also that such construction would do violence to the legislative purpose for the enactment of the Transportation Act, 1920. *Western Pacific* v. *Southern Pacific, supra,* is in consonance with the other decisions of this Court dealing with the right of an interested carrier to enjoin unauthorized competition and was given full effect by the Court of Appeals in its decision of this case.

[3]This court expressly held at l. c. 51: "On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law." The court held that it would suffice "if the bill discloses some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may *directly* and adversely affect the complainant's welfare by bringing about some material change in the transportation system." (Italics ours.)

II.

The question as to who may maintain an action as a party in interest has been settled by a long line of decisions of this Court and needs no further exposition or interpretation by this Court in this case.

Petitioners assert that they are parties in interest and therefore are authorized to maintain the action because their welfare may be adversely affected due to competition which will result on account of the construction of the Kansas City, Kansas, market. They point to no statute, contract or other basis of legal right which they claim entitles them to freedom from competition. In short, they assert no *direct* legal injury. They merely claim an indirect injury because their welfare may be affected. From this, they argue that they are parties in interest.

That petitioners are not parties in interest is established by the ruling of this Court in *Alabama Power Company* v. *Ickes*, 302 U. S. 464, in which an electric power company operating in Alabama sued to enjoin the performance of agreements made with the Federal Emergency Administration of Public Works to make loans and grants of money to assist several Alabama municipalities in constructing an electrical distribution system on the ground that the loans and grants were unlawful and that, the federal statute authorizing such loans and grants was unconstitutional. It was asserted by the power company that the construction of the municipal electric light plants with the proceeds derived from the loan and grant agreements would produce destructive competition which would result in financial loss to the plaintiff. This Court held that the plaintiff was not a party in interest who could raise the validity of the loan agreements or the statutes under which the Federal Administrator acted because plaintiff's legal right was not violated through

the construction of the competing facilities, even though its business may be destroyed as a result of such competition.

The principles of this case were restated by this Court in *Tennessee Electric Power Company* v. *Tennessee Valley Authority,* 306 U. S. 118. This case was brought by public utility companies engaged in the business of generating, transmitting and distributing electricity, most of them having local franchises, licenses or easements granted by the municipalities, to enjoin the Tennessee Valley Authority from generating electricity and from transmitting, distributing or selling the electricity so distributed in competition with the plaintiffs. Plaintiffs contended that the defendant Authority was acting in violation of the Federal Constitution and that competition would inflict substantial direct damage upon them. The defendant admitted the damage thus claimed would result but asserted that such damage was not consequent upon the violation of any legal right recognized by law. This Court sustained defendant's contention upon the same principle announced by it in *Alabama Power Company* v. *Ickes, supra.* In the latter case this Court followed *Railroad Company* v. *Ellerman,* 105 U. S. 166. In that case the railroad company was authorized by its charter to acquire, manage, use and enjoy wharves and their appurtenances in connection with its railroad. A Louisiana statute conferred upon the railroad power to obtain and use wharves connected with and incidental to the railroad. The railroad company acquired property which it used as a wharf and which in contravention to the statute and its charter it leased to certain persons. Ellerman operated public wharves under a contract with the City of New Orleans which gave him the right to collect revenues derived from such operations. He brought suit to enjoin the execution of the lease by the railroad company. The court held he

was not a party in interest who could raise the question of the usurpation of corporate power by the railroad company because it was apparent that his only interest was to prevent competition with himself as a wharfinger which the more extensive and challenged use by the lessees of the railroad wharf would create. This Court said that even though it would be conceded that the plaintiff would sustain damage because of such use by competing wharfingers that nevertheless such damage was indirect and remote and that such damage was not consequent upon a legal injury and therefore the plaintiff could not maintain the suit.

Petitioners claim that they are parties in interest because of diversion of traffic from other railroads to respondent and because the construction of the proposed rail facilities would be a duplication and therefore wasteful. These are matters which are of no concern to petitioners. These are matters which conceivably might be complained of by the government, the Interstate Commerce Commission or the regulating body of the State of Kansas where the tracks are to be constructed, or by a competing carrier whose territory was to be invaded by the proposed construction. But petitioners cannot seek to maintain the action merely because possibly someone else whose legal right is affected could maintain it. This Court recognized this principle in *Interstate Commerce Commission* v. *Chicago, Rock Island and Pacific Ry. Co.*, 218 U. S. 88, 109, where it held that it was the established rule of this Court not to "listen to a party who complains of a grievance which is not his" as he cannot be heard to object merely because of injury to others. The courts of appeal have applied the same rule in the following cases:

Arkansas-Missouri Power Co. v. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A. 8th);
United States ex rel. New York Warehouse, Wharf & Terminal Ass'n v. *Dern, Secretary of War,* 68 Fed. (2d) 773 (D. C. App.);
Carolina Power & Light Co. v. *South Carolina Public Service Authority,* (C. C. A. 4th) 94 Fed. (2d) 520;
West Tennessee Power & Light Co. v. *City of Jackson,* (C. C. A. 6th) 97 Fed. (2d) 979.

This Court in *Edward Hines, Yellow Pine Trustee, et al.* v. *United States,* 263 U. S. 143, applied this principle. In that case plaintiff, who was engaged in the lumber business, brought a suit to enjoin the order of the Interstate Commerce Commission abolishing a so-called penalty charge of $10.00 per car per day on lumber held at reconsignment points. Plaintiffs claimed they were damaged by the order because they shipped direct to their own yards without reconsignment and because of the penalty charge they enjoyed advantages over lumber jobbers who were subject to the reconsignment charge. The order annulling the reconsignment charge destroyed this advantage and upon this act plaintiffs asserted legal injury forming the basis of their right to maintain the action. This Court held that the asserted damage did not arise as a result of a legal injury and that consequently plaintiffs have shown no interest which entitles them to sue.

Under the cases decided by this Court, before one may institute an action as a party in interest he must demonstrate that his legal right is directly menaced. As to railroad companies whose territory is to be invaded and as to the federal government, the Interstate Commerce Commission or any state commission involving the public interest, those rights are created by a transportation act of 1920.

A consideration of the cases cited in the footnote, page 82, in *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific R. R. Co.*, 289 U. S. 82, will disclose that all the cases under paragraph 20 have been brought by a railroad company whose territory was sought to be invaded by a proposed extension except two cases wherein a party whose lands were to be appropriated by condemnation for the purpose of constructing an extension of a railroad in violation of paragraph 18. The right of a landowner to enjoin was discussed in *Texas, etc., R. Co.* v. *North Side Ry. Co.*, 276 U. S. 476. This Court ruled in that case that a landowner whose land is to be appropriated for the construction of a railroad is such a party in interest who may challenge the authority of the railroad company to proceed with the construction on the ground that it had not obtained a certificate of convenience and necessity, as required by paragraph 18. To the same effect is *Smyth, et al.* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326.

But these cases do not in any way aid petitioners because they do not claim to be landowners whose property is being appropriated for use in connection with the construction of the proposed tracks.

From the foregoing decisions and many others which could be cited, it is plain that petitioners are not parties in interest who could maintain this suit and that the decision of the Court of Appeals in so holding is in full accord with such decisions.

Conclusion.

It is respectfully submitted that the certiorari should be denied for the following reasons:

(1) The decision of the Circuit Court of Appeals followed the decisions of this Court in *Western Pacific* v. *Southern Pacific, supra; Texas and Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe Ry. Co., supra,* and other decisions of this Court in holding that petitioners were not parties in interest who could maintain this suit, and

(2) The question as to who is a party in interest who may maintain an action has been fully settled by a long line of decisions of this Court and needs no further exposition or consideration in this case.

Respectfully submitted,

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